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September 11, 1998

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Magalie Roman Salas, Esq.
Secretary
Federal Communications Commission
1919 M Street, N.W., Room 222
Washington, D.C. 20554

Hand Delivered

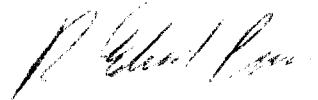
Re: *Ex Parte* Letter
CC Docket No. 97-211

Dear Ms. Salas:

Transmitted herewith, on behalf of Telstra Corporation Limited ACN 051 775 556 ("Telstra") and pursuant to Section 1.1206(b)(1) of the Commission's Rules, are two copies of an *ex parte* letter submitted to the Commission's staff yesterday in the above-referenced proceeding.

In the event there are questions concerning this matter, please contact me.

Very truly yours,



R. Edward Price

Enclosure

cc (w/o enc.): Michelle M. Carey, Esq.

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

September 10, 1998

Thomas Krattenmaker
Office of Plans and Policy
Federal Communications Commission
1919 M Street, N.W., Room 650
Washington, D.C. 20554

By Hand Delivery

Michelle M. Carey
Common Carrier Bureau
Federal Communications Commission
1919 M Street, N.W., Room 544
Washington, D.C. 20554

Re: Ex Parte In CC Docket No. 97-211

Dear Mr. Krattenmaker and Ms. Carey:

This is written on behalf of Telstra Corporation Limited (Telstra) further to an ex parte telephone conference I had with both of you on September 8, 1998 regarding the terms on which MCI Communications Corporation (MCI) proposes to divest its Internet business to Cable & Wireless plc (C&W) as a precondition to merging with WorldCom, Inc. (WorldCom).

During that conversation, I stated that Telstra opposed the divestiture as currently proposed because, following C&W's acquisition of MCI's Internet business, MCI would provide C&W basic telecommunication services, including international private line (IPL) services, on "favorable" terms and without filing an appropriate tariff. I stated that any "private carriage" exemption which might be claimed by MCI or C&W for such services were belied by the service description provided in the "Term Sheet" filed by MCI in confidence on or about August 25, 1998.

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At the time of our conference call, I was unaware of the August 19, 1998 ex parte letter filed by MCI providing additional information and argumentation regarding the "private carriage" exemption — information which apparently also was presented to various members of the FCC's staff at an August 18, 1998 ex parte meeting attended by representatives of MCI, WorldCom and C&W. In addition, the August 19, 1998 MCI ex parte notes that the private carriage exemption was previously advanced by MCI and outside counsel for WorldCom during an August 7, 1998 teleconference with members of the FCC's staff.

MCI May Not Discontinue or Reduce Its Common Carrier Services and Provide Said Services to C&W as a Private Carrier Without Meeting the Procedural and Substantive Terms of Section 214 of the Communications Act

Let me say at the outset that Telstra strongly objects to the ad hoc and unlawful fashion in which proponents of the merger are currently seeking to resolve one of the central legal and public policy issues now before the Commission — namely, whether MCI may discontinue or reduce the public offering of various common carrier telecommunication services (e.g., international private lines (IPLs)) — in order to sell them privately to C&W on terms which have never been fully disclosed, and without any formal application or adequate public notice and opportunity for comment. Section 214 of the Communications Act as well as prior judicial and Commission precedent — most notably, Independent Data Communications Manufacturers Association, Inc., 10 FCC Rcd 13717 (Comm Carrier Bur. 1995), and Southwestern Bell Telephone Co. v. FCC, 19 F.3d 1475 (D.C. Cir. 1994) — bar the Commission from proceeding in this fashion, quite apart from the merits of the issue. There is simply no precedent for the "private carriage" exemption MCI, C&W and WorldCom now seek on an ex parte basis so as to shroud the discriminatory service arrangements negotiated between MCI and C&W from the formal Section 214 application process and appropriate Commission scrutiny under Sections 201 and 203 of the Communications Act.

As MCI and WorldCom would be the first to admit, this is not a "garden variety" merger and divestiture. At issue here is the public interest in combining two of the largest Internet backbone networks in the world, and the terms and conditions on which all competing Internet Service Providers (ISPs), including C&W, will have access to those backbone networks following the merger.

If MCI is permitted to craft a private carriage exemption for access to the basic common carrier services which form the core of that backbone (e.g., IPLs, backhaul and domestic transmission facilities), and to do so by end-running the public interest review required by Title II of the Communications Act, the FCC would become a regulatory cypher. Other large telecommunication carriers which offer IPLs and other common carrier backbone facilities to ISPs would quickly get the message, and the Internet backbone business would be placed

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outside the FCC's purview in short order. That may or may not be in the public interest, but the Communications Act does not permit it to occur by default.

It would be ironic indeed if, after a six month antitrust review designed to ensure, inter alia, that a combination of the MCI and WorldCom Internet backbone facilities will not adversely affect competition for Internet services, the Commission were to conclude its own docket by blessing a secret "private carrier" deal which will tilt the Internet services market in favor of one major ISP — C&W — and its network services supplier, MCI-WorldCom. That cannot be what the FCC's Chairman had in mind when he recently said that U.S. consumers would be best served if all providers of Internet and other advanced telecommunication services began at the same starting line. And that surely cannot be squared with Title II of the Communications Act.

The specific arguments which MCI advances in its August 19 ex parte letter to support a private carrier exemption are easily rebutted.

There Is No Precedent for the "Private Carrier" Exemption Claimed
by the Merger's Proponents

First, the fact that the private carrier arrangement has been offered as part of a line of business divestiture so that MCI and WorldCom can satisfy antitrust concerns which U.S. and foreign authorities otherwise had regarding the merger should be given no deference by the FCC. No competition authority has required MCI or WorldCom to merge or to enter into the private carriage arrangement at issue here. These were private business decisions. And it is self-evident that the parties should not be permitted to implement these decisions by violating the Communications Act so as to avoid a potential violation of various competition laws.

Second, the argument that the telecom services at issue will be provided to C&W are unique because they are part of a larger asset sale is unconvincing. Crediting that argument would permit any company to craft a private carrier exemption merely by selling customer premises equipment along with basic telecom services. Moreover, a review of the underlying documents, to the extent they are available, shows that the parties themselves were readily able to separate the asset deal from the services deal — e.g., the Term Sheet references separate schedules for the telecom services at issue as well, apparently, as detailed route-by-route and service-by-service pricing terms. That may well be one reason why neither MCI nor C&W has fully disclosed the relevant contracts to the FCC.

Third, the principal cases cited in MCI's ex parte letter — NorLight, 2 FCC Rcd 132 (1987), and Southwestern Bell, supra — concerned the grant of private carrier status for services which had never been offered on a common carrier basis. Moreover, both cases involved formal FCC proceedings, and the U.S. Court of Appeals decision in the Southwestern Bell case makes it clear that the FCC may not simply presume that a service is a private or common

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carrier offering; it must duly investigate the facts for itself.¹

Although the MCI *ex parte* makes much of the NorLight case, MCI wholly ignores the relevant Commission findings for the current docket. NorLight involved a consortium of Midwestern power companies which sought to offer service on a new interstate fiber optic network solely on a private carrier basis, and the service at issue had previously not been offered to the general public. Moreover, NorLight's owners were not regulated telecom carriers and hence were under no prior obligation to hold out said services to the public indifferently. In NorLight, the FCC also found that the public interest would not be harmed by classifying the enterprise as a private carrier because users would have access to ample common carrier facilities providing like services.

Here, by contrast, MCI seeks to withdraw a significant set of basic common carrier services from the public domain (e.g., IPLs and domestic trunk transmission services) and to reclassify them as private carriage solely for C&W's benefit. And, unlike NorLight, MCI is under a legal obligation to provide the IPL and other services at issue as a common carrier because it has held itself out as a common carrier for years. See, e.g., MCI Tariff FCC No. 1, Section C.2.012 (Dedicated Leased Line Digital Services).

Fourth, for various reasons, if MCI is permitted to discontinue the public provision of IPL and other common carrier facilities needed for Internet backbone access, similar common carrier substitutes may not be available and the precedent may be used by others unilaterally to withdraw like services from common carriage (i.e., without filing a Section 214 application). The post-merger company, MCI-WorldCom, will have significant power in the IPL market; the most recently available data shows that together the companies would control over 45% of the U.S. IPL market. Further, C&W, the beneficiary of the private carrier arrangement, has monopoly power on the foreign end in several markets (e.g., Jamaica, Bermuda and Hong Kong). Thus, by obtaining U.S. IPLs on favorable "private" terms from MCI, it would be able to exercise market power and discriminate against other entities seeking end-to-end IPLs. In addition, under the noncompete terms of the divestiture, as Telstra explained in its July 22 ex parte letter, MCI-WorldCom would be precluded from offering like IPL services to Telstra and other existing customers that are assigned to C&W.

¹ See also MCI Telecommunications Corp. v. FCC, 842 F.2d 1296 (D.C. Cir. 1988) (remanding an FCC order approving tariff principles which were asserted to be discriminatory by MCI because FCC failed to obtain the relevant tariff documents and make a factual comparison of the price terms vis-a-vis comparable services offered AT&T).

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Lastly, and perhaps most importantly, as stated at the outset, Section 214 of the Communications Act expressly states that "no carrier shall discontinue, reduce or impair service" unless the FCC has certified that "neither the present nor future public convenience and necessity will be adversely affected thereby" The courts have construed this requirement broadly. See, e.g., ITT World Communications Inc. v. New York Telephone Co., 381 F. Supp. 113 (S.D.N.Y. 1974). Neither MCI nor C&W have sought such a Section 214 certificate. Yet, MCI's prior description of the divestiture (e.g., the June 3 ex parte submission transmitted by MCI's Mary C. Brown, as well as the Term Sheet later filed in confidence) imply that C&W will receive the same (if not identical) basic telecommunication services which MCI now offers on a common carrier basis. In other words, the best available evidence strongly suggests that MCI will only be able to meet its "private carrier" commitments to C&W by discontinuing or reducing its existing common carrier services.²

In these circumstances, as the FCC and the courts have emphasized, the proponent of the private carrier service plainly has the burden of proceeding under Section 214 and demonstrating the public interest benefits of its contemplated action. As the D.C. Circuit stated in Southwestern Bell, "a carrier cannot vitiate its common carrier status merely, by entering into private contractual relationships with its customers." 19 F.3d at 1481 (citations omitted). For that and other reasons (e.g., to prevent the price discrimination banned by Section 201), the FCC has closely scrutinized the requests of existing carriers to withdraw or reclassify an existing common carrier service as private carriage. And, in the leading case to date, Independent Data Communication Manufacturer's Assn., supra — a case which MCI tellingly overlooks — the FCC denied AT&T the right to reclassify its frame relay backbone services as a "private carriage" service because, inter alia, AT&T had long provided the services pursuant to tariff. MCI has failed to show why the facts of its case are any different.

* * *


² This inference is also warranted from MCI's most recent description of the telecom services to be provided to C&W which, significantly, also makes no reference as to their "private carrier" status. Specifically, in a separate August 25, 1998 *ex parte* letter to the FCC's Secretary by MCI's Larry A. Blosser, MCI states that: "C&W is entitled to receive a specified amount of point-to-point private line capacity required to support the existing Internet network, as well as the projected growth in its Internet network. The capacity provided could be either dedicated to support the Internet networks or, depending upon routes and volumes, might be used by MCI to support other communications services in addition to C&W's Internet network." Id. at pp. 1-2. The generic nature and broad scope of the MCI services described here are, of course, quite at odds with the private carrier service arguments proffered by MCI but one week earlier.

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To summarize then, there is no factual or legal predicate for the private carriage exemption that MCI claims for the IPL and other basic telecommunication services it proposes to offer to C&W. Moreover, even if there were such a predicate, Section 214 of the Communications Act requires MCI and/or C&W to seek a certificate from the FCC which may not be granted absent prior notice and public comment, and a showing that the present and future public interest would be served by withdrawing said services from the common carrier domain. Enforcement of the procedural safeguards provided by Section 214 is especially important here because the services at issue will affect competitive access to the largest U.S. Internet backbone network for numerous Internet Service Providers in the U.S. and abroad

In view of the foregoing, it continues to be Telstra's view that any basic telecommunication services MCI proposes to offer C&W, including IPL services, must be provided pursuant to tariff, and accordingly must be unbundled and cost-based.

Very truly yours,


Gregory C. Staple

cc: Chairman William E. Kennard
Commissioner Susan Ness
Commissioner Harold Furchtgott-Roth
Commissioner Michael K. Powell
Commissioner Gloria Tristani
Christopher Wright, General Counsel
Jeffrey Lanning, Office of General Counsel
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